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May 27, 2008

**VIA HAND DELIVERY**

Ms. LaDonna Castañuela (MC-105)  
Chief Clerk  
Texas Commission on Environmental Quality  
12100 Park 35 Circle, Building F  
Austin, Texas 78753

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 MAY 27 PM 3:58  
CHIEF CLERKS OFFICE

RE: **TCEQ Docket No. 2007-1833-UCR**; SOAH Docket No. 582-08-0990;  
Application of City of College Station Pursuant to Water Code 13.255(a) to  
Decertify a Portion of Certificate of Convenience and Necessity No. 11340 of  
Wellborn Special Utility District (Application No. 35717-C)

Dear Ms. Castañuela:

Enclosed please find an original and twelve (12) copies of Wellborn Special Utility District's Brief in Support of the ALJ's Proposal for Decision to be filed in the above-captioned matter. Please file mark the remaining copy and return it to with our courier delivering same.

A copy of this letter and attached document is being served on all parties.

Sincerely,

Leonard H. Dougal

LHD:pjs  
Enclosure

cc: **VIA HAND DELIVERY**  
Hon. Roy Scudday  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15th Street, Suite 502  
Austin, Texas 78701

**VIA HAND DELIVERY**

Docket Clerk  
State Office of Administrative Hearings  
300 West 15th Street, Suite 502  
Austin, Texas 78701

**VIA HAND DELIVERY**

Mr. Brian MacLeod (MC-173)  
Texas Commission on Environmental Quality  
Legal Division  
12100 Park 35 Circle, Building A  
Austin, Texas 78753

**VIA HAND DELIVERY**

Mr. Bill Dugat  
Bickerstaff, Heath, Smiley, Pollan,  
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816 Congress Avenue, Suite 1700  
Austin, Texas 78701

**VIA HAND DELIVERY**

Mr. Blas Coy (MC-103)  
Office of Public Interest Council  
Texas Commission on Environmental Quality  
12100 Park 35 Circle, Building F  
Austin, Texas 78753

SOAH DOCKET NO. 582-08-0990  
TCEQ DOCKET NO. 2007-1833-UCR

2008 MAY 27 PM 3:59

CHIEF CLERKS OFFICE

IN THE MATTER OF THE  
APPLICATION OF CITY OF  
COLLEGE STATION PURSUANT TO  
WATER CODE 13.255(A) TO DECERTIFY  
PORTION OF CERTIFICATE OF  
CONVENIENCE AND NECESSITY (CCN)  
NO. 11340 OF WELLBORN  
SPECIAL UTILITY DISTRICT AND TO  
AMEND CCN NO. 10169 IN BRAZOS  
COUNTY, TEXAS  
(APPLICATION NO. 35717-C)

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BEFORE THE

TEXAS COMMISSION

ON ENVIRONMENTAL QUALITY

**WELLBORN SPECIAL UTILITY DISTRICT'S  
BRIEF IN SUPPORT OF THE ALJ'S PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:

Wellborn Special Utility District ("Wellborn") files this Brief in support of the  
Administrative Law Judge's Proposal for Decision ("PFD"), rendered on May 5, 2008, and  
respectfully states as follows:

**I.  
INTRODUCTION**

In the PFD, the ALJ properly recommends that the application of the City of College  
Station ("City" or "Applicant") be dismissed. However, Wellborn urges that an additional  
conclusion of law be added to the PFD to make clear that the Agreement for the Bulk Sale and  
Purchase of Water (the "1992 Agreement"),<sup>1</sup> which is the subject of the City's application,  
cannot possibly be the type of "agreement" contemplated by Section 13.255(a).

<sup>1</sup>See 1992 Agreement, Ex. 7, City of College Station's Application to Amend a Water Certificate of Convenience  
and Necessity Under Water Code Section 13.255.

This case involves the latest in a series of ill-advised actions by the City to encroach upon, or involuntarily appropriate, a large area of Wellborn's Certificate of Convenience and Necessity ("CCN") and associated retail water customers. In its Application to Amend Water Certificate of Convenience and Necessity Under Water Code Section 13.255 ("Application"), the City asserts that the long-expired 1992 Agreement is an "agreement" contemplated by Section 13.255(a), and should be enforced by the TCEQ. Wellborn strongly disagrees with the City's position.

While there are numerous reasons that the 1992 Agreement is not enforceable against Wellborn (which were raised in Wellborn's Plea to the Jurisdiction and First Amended Answer), there is nothing to prevent the TCEQ from simply stating that the 1992 Agreement utterly fails to meet the requirements of a Section 13.255(a) agreement and once and for all put the City's claims to rest. The PFD would be enhanced by drawing the simple legal conclusion that, based upon a plain reading of the Statute, the 1992 Agreement does not meet the requirements of Section 13.255(a).

## **II.**

### **THE PFD SHOULD STATE THAT THE 1992 AGREEMENT IS NOT A SECTION 13.255(A) AGREEMENT**

A simple review of the 1992 Agreement shows that it could not possibly be the type of agreement contemplated by Section 13.255(a). On its face, the 1992 Agreement is exactly what it purports to be, *a contract for the bulk sale and purchase of water*, whereby Wellborn's predecessor (Wellborn Water Supply Corporation, a now dissolved corporation) purchased wholesale water from the City (albeit at retail customer rates).<sup>2</sup> Of the twenty-four paragraphs in

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<sup>2</sup> Paragraph 15 of the 1992 Agreement clearly provides that Wellborn Water Supply Corporation is to pay for water at the "same rate as charged to rate payers within the City." Hence, unlike many wholesale water contracts, Wellborn received no volume discount on the water price.

the 1992 Agreement, all but one paragraph deal with the terms by which the parties agreed to supply or purchase wholesale water, including provisions dealing with delivery volumes, delivery points, pricing, water quality, metering, billing, and payment.

In its Application, the City points to a single inartfully drawn paragraph for the proposition that the 1992 Agreement is a Section 13.255(a) agreement. The subject paragraph, however, makes no mention of: 1) the Water Code, 2) Section 13.255, 3) single certification of any CCN, or 4) the filing of the agreement with any regulatory authority. Further, despite the opportunity to do so, and the passage of more than a decade in time, the City provides no evidence that it ever attempted to file the 1992 Agreement and obtain TCEQ approval prior to the date of the City's Application.

By its own terms, Section 13.255(a) contemplates a specific process for parties to reach an agreement. First, an area is annexed by a city. Second, the city and the CCN holder enter into a voluntarily written agreement to transfer the CCN for a specific, defined area within the annexed area. In this regard the statute provides, in relevant part:

***In the event that an area is incorporated or annexed by a municipality***, either before or after the effective date of this section, the municipality and a retail public utility that provides water or sewer service to all or part of the area pursuant to a certificate of convenience and necessity ***may agree in writing that all or part of the area may be served by a municipally owned utility***, by a franchised utility, or by the retail public utility. \* \* \* The executed agreement shall be filed with the commission, and the commission, on receipt of the agreement, shall incorporate the terms of the agreement into the respective certificates of convenience and necessity of the parties to the agreement.<sup>3</sup>

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<sup>3</sup> TEX. WATER CODE ANN. § 13.255(a) (emphasis added).

The 1992 Agreement was executed on October 22, 1992, *more than ten years prior* to the City's 2002 annexation now at issue in this case.<sup>4</sup> Consequently, the 1992 Agreement on its face fails to meet the requirements of an "agreement" under Section 13.255(a) because it was executed *prior* to the City's 2002 annexation.<sup>5</sup> Wellborn's complete argument on this issue need not be repeated here, but can be found in Section III, B (beginning on page 9) of Wellborn's brief filed on March 31, 2008 titled "Brief in Support of Plea to the Jurisdiction and Motion to Determine Scope and Jurisdiction of Contested Case Hearing."

Therefore, Wellborn urges that the PFD be amended, and that the Commission's final order include an additional conclusion of law, which states:

The 1992 Agreement does not constitute an agreement of the type required by Section 13.255(a) of the Texas Water Code.

### **III. CONCLUSION**

The City's Application has numerous flaws, but the most basic defect is that on its face the 1992 Agreement fails to conform to the statutory requirements. The City's Application therefore is yet another failed attempt by the City to acquire, without proper compensation, portions of Wellborn's CCN, an issue which has previously been before the TCEQ and Texas courts (including appeals all the way to the Texas Supreme Court). None of the previous cases have found that the City has any right to encroach upon, or take over, portions of Wellborn's CCN.

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<sup>4</sup> See 1992 Agreement; Ex. 7, City of College Station's Application to Amend a Water Certificate of Convenience and Necessity Under Water Code Section 13.255.

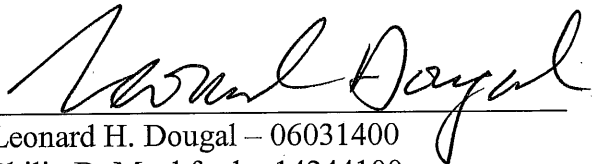
<sup>5</sup> See TEX. WATER CODE ANN. § 13.255(a).

WHEREFORE, Wellborn Special Utility District respectfully prays that the Commissioners of the TCEQ:

1. Grant Wellborn's Plea to the Jurisdiction and dismiss the City of College Station's Application as recommended in the Administrative Law Judge's Proposal for Decision;
2. Add an additional conclusion of law to the Commission's Order stating that the 1992 Agreement does not constitute an agreement of the type required by Section 13.255(a) of the Texas Water Code; and
3. Award such other and further relief to which Wellborn may show itself justly entitled.

Respectfully submitted,

JACKSON WALKER L.L.P.  
100 Congress Avenue, Suite 1100  
Austin, Texas 78701  
512-236-2000  
Fax No. 512-391-2112

By:   
Leonard H. Dougal – 06031400  
Philip D. Mockford – 14244100

ATTORNEYS FOR WELLBORN SPECIAL  
UTILITY DISTRICT

## CERTIFICATE OF SERVICE

This is to certify that on this 27th day of May, 2008, a true and correct copy of the foregoing document was served on the following parties via the manner indicated below:

Ms. LaDonna Castañuela (MC-105)  
Chief Clerk  
Texas Commission on Environmental Quality  
12100 Park 35 Circle, Building F  
Austin, Texas 78753

*Hand Delivery*

Honorable Roy Scudday  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78701

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